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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KARTIK SESHADRI,  
Plaintiff,  
  
v.  
BRITISH AIRWAYS PLC,  
Defendant.

Case No. 3:14-cv-00833-BAS(WVG)

## **ORDER:**

**(1) DENYING PLAINTIFF'S MOTION FOR PARTIAL REMAND (ECF NO. 9);**

**(2) GRANTING DEFENDANT'S MOTION TO DISMISS (ECF NO. 5); AND**

**(3) DENYING DEFENDANT'S MOTION TO STRIKE (ECF NO. 4)**

On March 6, 2014, Plaintiff Kartik Seshadri (“Plaintiff”) commenced this action against Defendant British Airways, Plc (“Defendant”) in San Diego Superior Court alleging claims for property damage pursuant to Articles 17 and 22 of the Montreal Convention and intentional infliction of emotional distress. Defendant removed this action to federal court on April 8, 2014 on the grounds of diversity of citizenship under 28 U.S.C. § 1332 and federal question under 28 U.S.C. § 1331.

28 ||| Defendant now moves to dismiss Plaintiff's claim for intentional infliction of

1 emotional distress pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No.  
 2 5), and to strike Plaintiff's prayer for punitive damages pursuant to Federal Rule of  
 3 Civil Procedure 12(f) (ECF No. 4). Plaintiff concurrently moves to remand his  
 4 cause of action for intentional infliction of emotional distress to San Diego Superior  
 5 Court (ECF No. 9).

6 The Court finds these motions suitable for determination on the papers  
 7 submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following  
 8 reasons, the Court (1) **DENIES** Plaintiff's motion for partial remand; (2) **GRANTS**  
 9 Defendant's motion to dismiss Plaintiff's cause of action for intentional infliction of  
 10 emotional distress; and (3) **DENIES** Defendant's motion to strike Plaintiff's prayer  
 11 for punitive damages.

## 12 I. BACKGROUND

13 Plaintiff alleges he is a "world-renowned musician" in the field of Indian  
 14 Classical Music. (ECF No. 1-2 ("Compl.") at ¶ 15.) When Plaintiff performs, he  
 15 does so with a specific sitar ("Sitar") which he has owned for over thirty-five years.  
 16 (*Id.* at ¶ 16.) The Sitar had been "specially handcrafted for Plaintiff to fit his needs  
 17 and 'individual tone' which is a hallmark of his style and playing." (*Id.*) When he  
 18 travels with the Sitar, Plaintiff uses a "specialized protective instrument case"  
 19 whose shape, materials, and design allegedly make it apparent to any person that the  
 20 case holds a fragile musical instrument. (*Id.* at ¶ 21.)

21 On or about July 29, 2013, Plaintiff alleges he purchased a round-trip ticket  
 22 from Defendant, a global airline, to travel from the United States to India. (*Id.* at ¶¶  
 23 8, 17.) Plaintiff's return flight was scheduled to leave New Delhi, India on  
 24 September 15, 2013 and arrive in San Diego on the same day, with a connection  
 25 through London. (*Id.* at 17.) The return flight was allegedly operated by Defendant  
 26 on an aircraft owned by Defendant, and all baggage on the plane was allegedly  
 27 handled by Defendant, its agents or employees. (*Id.* at ¶ 18.) On September 15,  
 28 2013, Plaintiff contends he arrived at the New Delhi airport with the Sitar in its case

1 and communicated to a check-in representative for Defendant that he was  
2 transporting a fragile musical instrument requiring special handling. (*Id.* at ¶¶ 20-  
3 22.) Defendant's agent allegedly acknowledged the delicate nature of the Sitar,  
4 placed a fragile tag on the bag holding the case, and then took control of it. (*Id.* at ¶  
5 22-23.)

6 Upon arriving in San Diego, Plaintiff learned the Sitar had not been on the  
7 connecting flight out of London which distressed Plaintiff. (*Id.* at ¶¶25-26.) The  
8 Sitar arrived in San Diego the next day on September 16, 2013. (*Id.* at ¶ 28.) After  
9 Plaintiff collected the Sitar at the San Diego airport from Defendant's baggage  
10 agent and took it home, he discovered the outer canvas bag was allegedly  
11 "extremely damp." (*Id.*) When Plaintiff unpacked the Sitar, he contends the hard  
12 case had a "thick layer of condensation over its entirety" and the "Sitar itself was  
13 freezing to the touch, a combination of frozen and soaked." (*Id.*) Upon discovering  
14 the Sitar was "in an unsalvageable condition," Plaintiff allegedly became  
15 "extremely distressed to the point of panic." (*Id.*) On September 17, 2013, Plaintiff  
16 contends a representative of Defendant contacted him in response to his numerous  
17 calls and messages. (*Id.* at ¶¶ 28-29.) The representative allegedly stated that the  
18 only way luggage could arrive either frozen or with extreme condensation is if it  
19 had been placed in the wrong cargo hold which was not pressurized for baggage.  
20 (*Id.* at ¶ 29.)

21 On March 6, 2014, Plaintiff commenced this action against Defendant in San  
22 Diego Superior Court alleging claims for property damage pursuant to Articles 17  
23 and 22 of the Montreal Convention and intentional infliction of emotional distress.  
24 Defendant now moves to dismiss Plaintiff's claim for intentional infliction of  
25 emotional distress pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No.  
26 5), and to strike Plaintiff's prayer for punitive damages pursuant to Federal Rule of  
27 Civil Procedure 12(f) (ECF No. 4). Plaintiff also moves to remand his cause of  
28 action for intentional infliction of emotional distress to San Diego Superior Court

1 (ECF No. 9).

2 **II. LEGAL STANDARD**

3 **A. Subject Matter Jurisdiction**

4 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian*  
 5 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power  
 6 authorized by Constitution and statute, which is not to be expanded by judicial  
 7 decree.” *Id.* (internal citations omitted). “It is to be presumed that a cause lies  
 8 outside this limited jurisdiction and the burden of establishing the contrary rests  
 9 upon the party asserting jurisdiction.” *Id.* (internal citations omitted); *see also*  
 10 *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). “The  
 11 Ninth Circuit strictly construe[s] the removal statute against removal jurisdiction.”  
 12 *Grace v. Wells Fargo Bank, N.A.*, 926 F. Supp. 2d. 1173, 1174 (S.D. Cal. 2013)  
 13 (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

14 **1. Federal Question**

15 Pursuant to 28 U.S.C. § 1441, “a defendant may generally remove a civil  
 16 action from state court to federal district court if the district court would have had  
 17 subject matter jurisdiction had the action been originally filed in that court.” *Roth*  
 18 *v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1124 (9th Cir. 2013). Federal  
 19 question jurisdiction is governed by the well-pleaded complaint rule, which  
 20 provides that federal jurisdiction exists only if a federal question is presented on the  
 21 face of a properly pleaded complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386,  
 22 392 (1987). An affirmative defense raising a federal question is insufficient to  
 23 confer federal question jurisdiction. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1,  
 24 6-9 (2003); *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 687 (9th Cir. 2007). The  
 25 doctrine of complete preemption is a narrow corollary to the well-pleaded  
 26 complaint rule. *Balcorta v. Twentieth Century–Fox Film Corp.*, 208 F.3d 1102,  
 27 1107 (9th Cir. 2000). Under the complete preemption doctrine, “the preemptive  
 28 force of some statutes is so strong that they ‘completely preempt’ an area of state

1 law” and give rise to federal question jurisdiction. *Id.* (citing *Metro. Life Ins. Co.*  
 2 *v. Taylor*, 481 U.S. 58, 65 (1987); *Franchise Tax Bd. of State of Cal. v. Constr.*  
 3 *Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24 (1983)). “The test is whether  
 4 Congress clearly manifested an intent to convert state law claims into federal-  
 5 question claims.” *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir.  
 6 1993) (citation omitted). “If so, then the cause of action necessarily arises under  
 7 federal law and the case is removable. If not, then the complaint does not arise  
 8 under federal law and is not removable.” *Beneficial Nat. Bank*, 539 U.S. at 9.

9           2.     Diversity Jurisdiction

10       “District courts . . . have original jurisdiction of all civil actions where the  
 11 matter in controversy exceeds the sum or value of \$75,000’ and where all parties to  
 12 the action are ‘citizens of different states.’” *Grace*, 926 F. Supp. 2d at 1174  
 13 (quoting 28 U.S.C. § 1332(a)). “The calculation of the amount in controversy takes  
 14 into account claims for general damages, special damages, punitive damages if  
 15 recoverable as a matter of law, and attorneys’ fees recoverable by statute or  
 16 contract.” *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 984 (S.D. Cal.  
 17 2005) (citations and internal quotations omitted); *see also Conrad Assocs. v.*  
 18 *Hartford Accident & Indem. Co.*, 994 F.Supp. 1196, 1198-99 (N.D. Cal. 1998). The  
 19 amount in controversy does not include interest or costs of suit. *Id.*; 28 U.S.C. §  
 20 1332(a).

21       “Generally, the amount in controversy is to be decided from the complaint  
 22 itself.” *Rippee*, 408 F. Supp. 2d at 984; *see also Singer v. State Farm Mut. Auto.*  
 23 *Ins. Co.*, 116 F.3d 373, 377 (9th Cir.1997) (citation omitted); 28 U.S.C. §  
 24 1446(c)(2). “Where it is not facially evident from the complaint that more than  
 25 \$75,000 is in controversy, the removing party must prove, by a preponderance of  
 26 the evidence, that the amount in controversy meets the jurisdictional threshold.”  
 27 *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003);  
 28 *see also* 28 U.S.C. §§ 1332(a), 1446.

Under the preponderance of the evidence standard, “the defendant must provide evidence establishing that it is ‘more likely than not’ that the amount in controversy exceeds [\$75,000].” *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). Conclusory allegations and speculative arguments regarding the potential value of the award are insufficient. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004) (citing *Gaus*, 980 F.2d at 567); *see also Conrad Assocs.*, 994 F.Supp. at 1198. A statement in the petition for removal that “upon information and belief” the amount in controversy exceeds \$75,000 does not constitute proof by a preponderance of the evidence. *Id.* A district court may consider facts in the petition for removal, and may require parties to submit “summary-judgment type evidence” relevant to the amount in controversy at the time of removal. *Singer*, 116 F.3d at 377 (citation omitted).

### **B. Federal Rule of Civil Procedure 12(b)(6)**

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court must accept all allegations of material fact pleaded in the complaint as true and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather, it must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557) (internal

1 quotations omitted).

2 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
 3 relief’ requires more than labels and conclusions, and a formulaic recitation of the  
 4 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting  
 5 *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (alteration in original)). A court need  
 6 not accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the  
 7 deference the court must pay to the plaintiff’s allegations, it is not proper for the  
 8 court to assume that “the [plaintiff] can prove facts that [he or she] has not alleged  
 9 or that defendants have violated the . . . laws in ways that have not been alleged.”  
 10 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459  
 11 U.S. 519, 526 (1983).

12 Generally, courts may not consider material outside the complaint when  
 13 ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990); *Branch v. Tunnell*, 14 F.3d 449, 453  
 15 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. Cnty of Santa Clara*,  
 16 307 F.3d 1119, 1121 (9th Cir. 2002)). “However, material which is properly  
 17 submitted as part of the complaint may be considered.” *Hal Roach Studios, Inc.*,  
 18 896 F.2d at 1542, n. 19. Documents specifically identified in the complaint whose  
 19 authenticity is not questioned by the parties may also be considered. *Fecht v. Price  
 20 Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statute on other  
 21 grounds); *see also Branch*, 14 F.3d at 453-54. Such documents may be considered,  
 22 so long as they are referenced in the complaint, even if they are not physically  
 23 attached to the pleading. *Branch*, 14 F.3d at 453-54; *see also Parrino v. FHP, Inc.*,  
 24 146 F.3d 699, 706 (9th Cir. 1998) (extending rule to documents upon which the  
 25 plaintiff’s complaint “necessarily relies” but which are not explicitly incorporated  
 26 in the complaint). Moreover, the court may consider the full text of those  
 27 documents even when the complaint quotes only selected portions. *Fecht*, 70 F.3d  
 28 at 1080 n. 1. Additionally, the court may consider materials which are judicially

1 noticeable. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

2 As a general rule, a court freely grants leave to amend a complaint which has  
 3 been dismissed. Fed. R. Civ. P. 15(a); *Schreiber Distrib. Co. v. Serv-Well Furniture*  
 4 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). However, leave to amend may be denied  
 5 when “the court determines that the allegation of other facts consistent with the  
 6 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib.*  
 7 *Co.*, 806 F.2d at 1401 (citing *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th  
 8 Cir.1962)).

9 **C. Federal Rule of Civil Procedure 12(f)**

10 Federal Rule of Civil Procedure 12(f) provides that a court may strike from  
 11 the pleadings any insufficient defense or any redundant, immaterial, impertinent, or  
 12 scandalous matter. Fed. R. Civ. P. 12(f). “Immaterial” means that the matter has  
 13 no essential or important relationship to the claim for relief or the defenses being  
 14 pleaded. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993) (citation  
 15 omitted), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).  
 16 “Impertinent” matter includes statements that do not pertain, and are not necessary,  
 17 to the issues in question. *Id.* “Scandalous” matter includes allegations that cast a  
 18 cruelly derogatory light on a party or other person. *In re 2TheMart.com, Inc. Sec.*  
 19 *Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000). “[T]he function of a 12(f)  
 20 motion to strike is to avoid the expenditure of time and money that must arise from  
 21 litigating spurious issues by dispensing with those issues prior to trial.” *Sidney-*  
 22 *Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

23 **III. ANALYSIS**

24 Defendant moves to dismiss Plaintiff’s intentional infliction of emotional  
 25 distress claim on the ground it is preempted by the Montreal Convention which  
 26 prohibits recovery for purely emotional damages. (ECF No. 5.) Plaintiff argues in  
 27 response that the Montreal Convention does not completely preempt state law  
 28 claims and moves to remand his state law claim for intentional infliction of

1 emotional distress. (ECF No. 9.) Defendant also moves to strike Plaintiff's prayer  
2 for punitive damages. (ECF No. 4.)

### **A. Montreal Convention**

The Montreal Convention,<sup>1</sup> signed in 1999 and entered into force in November 2003, is an international treaty governing airliner liability for the “international carriage of persons, baggage or cargo performed by aircraft for reward.” Montreal Convention, art. 1(1).<sup>2</sup> The Montreal Convention supersedes the much older Warsaw Convention. *See id.* at art. 55; *Narayanan v. British Airways*, 747 F.3d 1125, 1127, n. 2 (9th Cir. 2014). Like its predecessor, the Montreal Convention’s purpose is to promote uniformity in the laws governing airliner liability and “harmonize the hodgepodge of supplementary amendments and intercarrier agreements of which the Warsaw Convention system of liability consists.” *Narayanan*, 747 F.3d at 1127, n. 2, 1131; *Richards v. Singapore Airlines Ltd*, 2013 WL 6405868, at \*3 (C.D. Cal. Dec. 4, 2013). However, the Montreal Convention is unique in that it “represents a significant shift away from a treaty that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers.” *Weiss v. El Al Israel Airlines, Ltd.*, 433 F.Supp.2d 361, 365 (S.D.N.Y. 2006).

With respect to liability, the Montreal Convention establishes a unified system of rules regarding passenger claims for personal injury arising out of an accident, wrongful death, loss or damage to baggage or cargo, and damages

<sup>1</sup> The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. No. 9740 (entered into force on November 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000), commonly and hereinafter referred to as the “Montreal Convention.” The United States is a party to the Montreal Convention. *Hornsby v. Lufthansa German Airlines*, 593 F.Supp.2d 1132, 1135 (C.D. Cal. 2009).

<sup>2</sup> The parties do not dispute that Plaintiff was engaged in international carriage when his Sitar case was damaged and his Sitar destroyed. (ECF No. 5-2 at pp. 4-6; Compl. at ¶¶ 17-24, 30.)

1 resulting from a transportation delay. Montreal Convention, arts. 17-19. The  
 2 Montreal Convention establishes the conditions for such claims, and sets limits on a  
 3 claimant's recovery when the conditions are met. *Id.* at arts. 17-19, 21-22.

4       The Montreal Convention provides for liability for damages sustained in the  
 5 case of death or bodily injury of a passenger. *Id.* at art. 17(1). The convention also  
 6 provides for strict carrier liability for destruction, loss, or damage to baggage if "the  
 7 event which caused the destruction, loss or damage took place on board the aircraft  
 8 or during any period within which the checked baggage was in the charge of the  
 9 carrier," except where the damage was caused by "the inherent defect, quality or  
 10 vice of the baggage. *Id.* at art. 17(2). Article 18 of the Montreal Convention  
 11 imposes liability for damage to cargo, and Article 19 imposes liability for damages  
 12 resulting from delay of baggage or cargo. *Id.* at arts. 18-19. Article 29 sets forth  
 13 the following limits on any claims for damages:

14       In the carriage of passengers, baggage and cargo, any action for  
 15 damages, however founded, whether under this Convention or in  
 16 contract or in tort or otherwise, can only be brought subject to the  
 17 conditions and such limits of liability as are set out in this  
 18 Convention without prejudice to the question as to who are the  
 19 persons who have the right to bring suit and what are their respective  
 rights. In any such action, punitive, exemplary or any other non-  
 compensatory damages shall not be recoverable.

20 *Id.* at art. 29.

21       Although the Warsaw Convention no longer applies to claims arising after  
 22 the effective date of the Montreal Convention, the case law developed under the  
 23 Warsaw Convention is still regarded as applicable in the interpretation of the  
 24 Montreal Convention "where the equivalent provision in the Montreal Convention  
 25 is substantively the same." *Narayanan*, 747 F.3d at 1127, n. 2; *Phifer v. Icelandair*,  
 26 652 F.3d 1222, 1223, n. 1 (9th Cir. 2011).

27       ///

28       ///

1                   **B. Plaintiff's Motion For Partial Remand**

2                   Both parties agree this Court has original jurisdiction over Plaintiff's first  
 3 cause of action on the basis of federal question jurisdiction. District courts "have  
 4 original jurisdiction of all civil actions arising under . . . treaties of the United  
 5 States," and Plaintiff's first cause of action arises under Articles 17 and 22 of the  
 6 Montreal Convention. 28 U.S.C. § 1331. "As a treaty of the United States, the  
 7 [Montreal] Convention is considered federal law for subject matter jurisdiction  
 8 purposes and is the supreme law of the land." *Best v. BWIA West Indies Airways*  
 9 *Ltd.*, 581 F. Supp. 2d 359, 362 (E.D. N.Y. 2008); *see also Rubin v. Air China Ltd.*,  
 10 2011 WL 1002099, at \*3 (N.D. Cal. Mar. 21, 2011). The parties disagree on  
 11 whether the Court has original jurisdiction over Plaintiff's second cause of action  
 12 for intentional infliction of emotional distress.<sup>3</sup> However, the Court finds it  
 13 appropriate to exercise supplemental jurisdiction over this claim.

14                  In any civil action of which the district courts have original jurisdiction, a  
 15 district court has "supplemental jurisdiction over all other claims that are so related  
 16 to claims in the action within such original jurisdiction that they form part of the  
 17 same case or controversy under Article III of the United States Constitution." 28  
 18 U.S.C. § 1337(a); 28 U.S.C. § 1331 ("The district courts shall have original  
 19 jurisdiction of all civil actions arising under . . . treaties of the United States."). "A  
 20 state law claim is part of the same case or controversy when it shares a 'common  
 21 nucleus of operative fact' with the federal claims and the state and federal claims  
 22 would normally be tried together." *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th  
 23 Cir. 2004). Supplemental jurisdiction "applies with equal force to cases removed to  
 24 federal court as to cases initially filed there; a removed case is necessarily one of

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25  
 26                  <sup>3</sup> The parties do appear to agree this Court has diversity jurisdiction over  
 27 this matter. However, Defendant has not proved by a preponderance of the  
 28 evidence that the amount in controversy exceeds \$75,000. *See Matheson*, 319 F.3d  
 at 1090; *see also* 28 U.S.C. §§ 1332(a), 1446(c)(2).

1 which the district courts have original jurisdiction.” *City of Chicago v. Int’l Coll. of*  
 2 *Surgeons*, 522 U.S. 156, 165 (1997). Once a district court has the power to hear a  
 3 case under 28 U.S.C. § 1367(a), its retention of supplemental jurisdiction over state  
 4 law claims is discretionary. *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1000  
 5 (9th Cir. 1997). A court may decline to exercise jurisdiction over a supplemental  
 6 state law claim if:

- 7                 (1) the claim raises a novel or complex issue of State law,
- 8                 (2) the claim substantially predominates over the claim or claims over  
                        which the district court has original jurisdiction,
- 9                 (3) the district court has dismissed all claims over which it has  
                        original jurisdiction, or
- 10                 (4) in exceptional circumstances, there are other compelling reasons  
                        for declining jurisdiction.

11                 28 U.S.C. § 1367(c).

12                 Here, Plaintiff’s cause of action for intentional infliction of emotional distress  
                        indisputably arises from a common nucleus of operative facts, namely Defendant’s  
                        alleged destruction of the Sitar during a flight on Defendant’s airline, such that  
                        Plaintiff would be expected to try them all in one judicial proceeding. *See United*  
                        *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The claim does not raise a novel  
                        or complex issue of state law, substantially predominate over the property damage  
                        claim, and there is no other compelling reason or exceptional circumstances for  
                        declining jurisdiction. *See* 28 U.S.C. § 1367(c). Plaintiff argues that if his claim  
                        for intentional infliction of emotional distress is not remanded, he would be forced  
                        to forfeit an otherwise viable state law claim. (ECF No. 8 at p. 8.) However, as  
                        discussed below, the Montreal Convention would operate as an affirmative defense  
                        to limit liability whether the claim was brought in federal or in state court.  
                        Therefore, in the interest of judicial economy, the Court exercises supplemental  
                        jurisdiction over Plaintiff’s cause of action for intentional infliction of emotional

1 distress and **DENIES** Plaintiff's motion for partial remand.

2           **C. Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6)**

3           Defendant moves to dismiss Plaintiff's claim for intentional infliction of  
 4 emotional distress pursuant to Rule 12(b)(6) on the ground Plaintiff's claim is  
 5 preempted by the Montreal Convention and purely emotional injuries are not  
 6 compensable under the Montreal Convention because they do not constitute "bodily  
 7 injury" under Article 17. (ECF No. 5.) Plaintiff argues in response that his claim is  
 8 not *completely* preempted and therefore the Montreal Convention does not apply.  
 9 (ECF No. 8 at p. 12.) However, Plaintiff is confusing defensive and complete  
 10 preemption.

11           Preemption may be either defensive or complete. *Worth v. Universal*  
 12 *Pictures, Inc.*, 5 F.Supp.2d 816, 820 (C.D. Cal. 1997). Defensive preemption,  
 13 which includes conflict preemption,<sup>4</sup> is brought as an affirmative defense to a state  
 14 claim, but does not create subject matter jurisdiction and does not support removal.  
 15 *Id.*; *Hall*, 476 F.3d at 687; see also *Caterpillar, Inc.*, 482 U.S. at 398 ("The fact that  
 16 a defendant might ultimately prove that a plaintiff's claims are preempted . . . does  
 17 not establish that they are removable to federal court"). "Complete preemption, on  
 18 the other hand, allows a claim to be removed and adjudicated in federal court." *Id.*

19           "The preemption determination made for purposes of determining  
 20 jurisdiction has no bearing on whether the defendant can actually establish a  
 21 substantive preemption defense." *Lyons v. Alaska Teamsters Emp'r Serv. Corp.*,  
 22 188 F.3d 1170, 1172 (9th Cir. 1999). "At the removal stage, the inquiry is solely  
 23 whether Congress intended a preemptive force so powerful as to displace entirely  
 24 any state cause of action within the ambit of the federal cause of action." *Whitman*

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25  
 26           <sup>4</sup> The Ninth Circuit recognizes three forms of defensive preemption:  
 27 express preemption, field preemption, and conflict preemption. *Retail Prop. Trust*  
 28 v. *United Broth. of Carpenters and Joiners of Am.*, --- F.3d ---, 2014 WL  
 4694802at, \*7 (9th Cir. Sept. 23, 2014).

*v. Raley's Inc.*, 886 F.2d 1177, 1180-81 (9th Cir. 1989). Whether the defendant can actually establish a substantive preemption defense, on the other hand, “is a substantive inquiry as to whether a legal defense exists.” *Id.* at 1181.

4       Here, in response to Defendant’s motion to dismiss, Plaintiff cites several  
5 cases that stand for the proposition that state law claims are not *completely*  
6 preempted by the Montreal Convention. (ECF No. 8 at pp. 5-7.) However, even  
7 those courts which hold there is no *complete* preemption, still recognize the  
8 Montreal Convention operates as an affirmative defense where it applies.<sup>5</sup>  
9 Accordingly, the Montreal Convention, at a minimum, acts as an affirmative  
10 defense to Plaintiff’s claim for intentional infliction of emotional distress where it  
11 applies.<sup>6</sup>

<sup>5</sup> See *Jensen v. Virgin Atl.*, 2013 WL 1207962, at \*4 (N.D. Cal. Mar. 25, 2013) (holding that the exclusivity provisions of the Montreal Convention operate as an affirmative defense), *Nankin v. Continental Airlines, Inc.*, 2010 WL 342632, at \*6 (C.D. Cal. Jan. 29, 2010)(holding that the Montreal Convention controls the remedies and available liabilities that can be imposed via state law causes of action); see also *Lathigra v. British Airways PLC*, 41 F.3d 535, 539 (9th Cir. 1994) (finding the plaintiff's state law claim was not covered by the scope of the Warsaw Convention); *Serrano v. Am. Airlines, Inc.*, 2008 WL 2117239, at \*7 (C.D. Cal. May 15, 2008) (addressing only whether the Montreal Convention completely preempted the plaintiff's state law claims).

<sup>6</sup> The Court recognizes a split of authority exists on the question of whether the Montreal Convention completely preempts all claims arising under its scope such that it vests original jurisdiction in federal court or if the Montreal Convention's limited liability provisions operate solely as an affirmative defense. *Compare Jensen*, 2013 WL 1207962, at \*3; *Zatta v. Societe Air France*, 2011 WL 2472280, at \*3 (C.D. Cal. Jun. 21, 2011); *Serrano*, 2008 WL 2117239, at \*7; *Nankin*, 2010 WL 342632, at \*8; *Narkiewicz v. Scandinavian Airlines Systems*, 587 F.Supp.2d 888, 890 (N.D. Ill., 2008); *Constantino v. Cont'l Airlines, Inc.*, 2014 WL 2587526, at \*3-4 (D.N.J. Jun. 9, 2014), with *Fadhilah v. Societe Air France*, 987 F. Supp.2d 1057, 1064 (C.D. Cal. 2013). To date, “[n]either the Supreme Court nor the Ninth Circuit has ruled on whether the Montreal Convention completely preempts a plaintiff’s state law causes of action.” *Jensen*, 2013 WL 1207962, at \*3; see also *Greig v. U.S. Airways, Inc.*, 2014 WL 2999199, at \*3 (D. Ariz. June 26, 2014). As the Court has subject matter jurisdiction over this entire matter, it does

1           An affirmative defense may be considered on a motion to dismiss where the  
 2 “allegations in the complaint suffice to establish” the defense. *Sams v. Yahoo! Inc.*,  
 3 713 F.3d 1175, 1179 (9th Cir. 2013). Although it does not enable removal,  
 4 defensive preemption does constitute a complete defense to a state law claim. *Hall*  
 5 *v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 689, n. 8 (9th Cir. 2007).

6           1. Application of Montreal Convention

7           The Montreal Convention preempts state law in the areas where it applies and  
 8 “provides the exclusive remedy for international passengers seeking damages  
 9 against airline carriers.” *Narayanan*, 747 F.3d at 1127; *El Al Israel Airlines, Ltd. v.*  
 10 *Tsui Yuan Tseng*, 525 U.S. 155, 171-72 (1999) (interpreting predecessor Warsaw  
 11 Convention); *Motorola, Inc. v. Fed. Exp. Corp.*, 308 F.3d 995, 999 (9th Cir. 2002)  
 12 (“The [Warsaw] Convention preempts state and federal claims falling within its  
 13 scope.” (citing Article 24 of the Warsaw Convention, the predecessor to Article 29  
 14 of the Montreal Convention)); *Schoenebeck v. Koninklijke Luchtvaart Maatschappij*  
 15 N.V., 2014 WL 1867001, at \*3 (N.D. Cal. May 8, 2014). Thus, a passenger whose  
 16 claim is not compensable under the Montreal Convention will have no recourse to  
 17 an alternate remedy. *El Al Israel Airlines, Ltd.*, 525 U.S. at 160-61. However,  
 18 “[t]he Convention’s preemptive effect on local law extends no further than the  
 19 Convention’s own substantive scope. A carrier, therefore, is indisputably subject to  
 20 liability under local law for injuries arising outside of that scope: *e.g.*, for passenger  
 21 injuries occurring before any of the operations of embarking or disembarking.” *Id.*  
 22 (internal quotations and citations omitted.) To determine whether a claim falls  
 23 within the scope of the Convention, courts are “directed to look to the Convention’s  
 24 liability provisions.” *King v. Am. Airlines, Inc.*, 284 F.3d 352, 358 (2d Cir. 2002)  
 25 (citing *Tseng*, 525 U.S. at 171-72).

26           The first question is therefore whether the Montreal Convention covers  
 27

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28 not need to resolve this conflict for purposes of this case and declines to do so. The  
 Court will treat the Montreal Convention as an affirmative defense where it applies.

1 Plaintiff's claim for intentional infliction of emotional distress arising out of  
 2 Defendant's alleged delay in delivering Plaintiff's Sitar and damage to the Sitar  
 3 case and destruction of the Sitar. (Compl. at ¶¶ 26-29.) The second is whether the  
 4 Montreal Convention permits recovery for emotional distress damages on the facts  
 5 alleged.

6                   a.     *Article 17(1)*

7                 Defendant argues that purely emotional injuries are not compensable under  
 8 the Montreal Convention because they do not constitute a "bodily injury" under  
 9 Article 17, while Plaintiff asserts that the Montreal Convention's provisions do not  
 10 apply to his claim. (ECF No. 5-2 at p. 8; ECF No. 8 at p. 12.)

11                 Article 17(1) of the Montreal Convention provides:

12                 The carrier is liable for damage sustained in case of death or bodily  
 13 injury of a passenger *upon condition only that the accident which*  
*caused the death or injury took place on board the aircraft* or in the  
 14 course of any of the operations of embarking or disembarking.

15                 Montreal Convention, art. 17(1) (emphasis added). Thus, Article 17(1) only applies  
 16 if "the accident which caused the . . . injury took place on board the aircraft or in the  
 17 course of any of the operations of embarking or disembarking." *Id.*; *see also Air*  
*France v. Saks*, 470 U.S. 392, 396 (1985) ("[Airline] is liable to a passenger under  
 18 the terms of the . . . Convention only if the passenger proves that an 'accident' was  
 19 the cause of [his or] her injury."). An accident is defined as an "unexpected or  
 20 unusual event or happening that is external to the passenger." *Saks*, 470 U.S. at  
 21 405; *see also Narayanan*, 747 F.3d at 1127. This definition should be flexibly  
 22 applied. *Id.*

24                 While the present case differs from the typical case where the alleged injury  
 25 took place while the passenger was on board the plane, or in the process of  
 26 embarking or disembarking the plane, Plaintiff alleges – and there appears to be no  
 27 dispute – that the alleged "accident which caused the . . . injury" at issue took place  
 28 on board the aircraft. *See* Compl. at ¶¶ 21-29, 34, 38-39; *Saks*, 470 U.S. at 398

1 (“[T]he text of Article 17 refers to an accident *which caused* the passenger’s injury,  
 2 and not to an accident which *is* the passenger’s injury.” (emphasis in original));  
 3 *Phifer v. Icelandair*, 652 F.3d 1222, 1224 (9th Cir. 2011). “[I]t is the *cause* of the  
 4 injury that must satisfy the definition rather than the occurrence of the injury  
 5 alone.” *Phifer*, 652 F.3d at 1294 (quoting *Saks*, 470 U.S. at 399). Accordingly,  
 6 Plaintiff’s claim for intentional infliction of emotional distress falls within the  
 7 substantive scope of Article 17(1).

8       “Article 17 does not allow recovery for purely mental injuries.” *Eastern*  
 9 *Airlines v. Floyd*, 499 U.S. 530, 534 (1991) (interpreting Article 17 of the Warsaw  
 10 Convention)<sup>7</sup>; Montreal Convention, art. 17(1). Mental or emotional injuries are  
 11 only recoverable under Article 17 when an accident has caused a passenger to suffer  
 12 physical injury. *Id.* at 552; *Carey v. United Airlines*, 255 F.3d 1044, 1051 (9th Cir.  
 13 2001) (“[P]hysical manifestations of emotional and mental distress do not satisfy  
 14 the ‘bodily injury’ requirement in Article 17.”). Plaintiff has alleged no physical or  
 15 bodily injury. Therefore his claim for intentional infliction of emotional distress  
 16 cannot stand under Article 17(1).

17                   b.     *Articles 17(2) and 19*

18       Plaintiff’s intentional infliction of emotional distress claim relates directly to  
 19 Defendant’s delay in delivering Plaintiff’s Sitar, and the alleged damage to the Sitar  
 20 case and destruction of the Sitar. (Compl. at ¶¶ 26-29, 38.) Article 17(2) expressly  
 21 provides for the liability of an airline in the case of “destruction or loss of, or of  
 22 damage to, checked baggage” if “the event which caused the destruction, loss or  
 23 damage took place on board the aircraft or during any period within which the  
 24 checked baggage was in the charge of the carrier.” Montreal Convention, art. 17(2).

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25  
 26                   7       Article 17 of the Warsaw Convention similarly stated: “The carrier  
 27 shall be liable for damage sustained in the event of the death or wounding of a  
 28 passenger or any other bodily injury suffered by a passenger, if the accident which  
 caused the damage so sustained took place on board the aircraft or in the course of  
 any of the operations of embarking or disembarking.” *See Saks*, 470 U.S. at 397.

1 Article 19 also expressly provides for liability of an airline “occasioned by delay in  
 2 the carriage by air of . . . baggage.” *Id.* at art. 19. The event that caused the damage  
 3 to the Sitar and its case allegedly took place on board the aircraft or while the Sitar  
 4 was in the charge of Defendant, and the delivery of the Sitar was delayed. (Compl.  
 5 at ¶¶ 27-29.) Accordingly, Plaintiff’s cause of action also falls within the  
 6 substantive scope of Articles 17(2) and 19.

7 An airline’s liability under Articles 17(2) and 19 is expressly limited by  
 8 Article 22. Article 22(2) limits the liability of an airline for the “destruction, loss,  
 9 damage or delay” of baggage to 1,000 Special Drawing Rights (“SDR”) for each  
 10 passenger, unless a special declaration of interest was made at the time the baggage  
 11 was checked and the appropriate fee paid. Montreal Convention, art. 22(2). No  
 12 special declaration of interest was made in this case (ECF No. 1-2 at ¶ 31), therefore  
 13 Plaintiff’s damages are limited to 1,000 SDR, unless Article 22(5) applies.<sup>8</sup>  
 14 Plaintiff alleges that it does. (Compl. at ¶¶ 32-35.) Article 22(5) provides that the  
 15 limiting liability provision of Article 22(2) does not apply “if it is proved that the  
 16 damage resulted from an act or omission of the carrier, its servants or agents, done  
 17 with intent to cause damage or recklessly and with knowledge that damage would  
 18 probably result.” Montreal Convention, art. 22(5).

19 However, Article 22(5) does not take Plaintiff’s cause of action outside the  
 20 scope of the Montreal Convention. The convention creates “no exception for an  
 21 injury suffered as a result of intentional conduct.” *Carey*, 255 F.3d at 1051. In  
 22 other words, the convention provides the exclusive remedy for claims arising out of

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23  
 24       <sup>8</sup> SDR are defined by the International Monetary Fund, and conversion  
 25 of SDR into U.S. Dollars “shall, in case of judicial proceedings, be made according  
 26 to the value of such currencies in terms of the [SDR] at the date of the judgement.”  
 27 Montreal Convention, art. 23(1). Pursuant to Article 24 of the Montreal  
 28 Convention, every five years an inflation factor is applied to revise the various  
 limits of liability. *Id.* at art. 24. The parties have not identified the current limit,  
 but the Court recognizes this amount may have increased when adjusted for  
 inflation.

1 a carrier's intentional misconduct. *See Dazo v. Globe Airport Sec. Servs.*, 295 F.3d  
 2 934, 940 (9th Cir. 2002) (interpreting the substantively similar Article 25 of the  
 3 Warsaw Convention); *see also Carey*, 255 F.3d at 1049-50; *Brandt v. Am. Airlines*,  
 4 2000 WL 288393, at \*6 (N.D. Cal. Mar. 13, 2000). "If a plaintiff establishes willful  
 5 misconduct by the carrier, Article [22(5)] lifts the Convention's limits on liability,  
 6 but the Convention remains the exclusive source for the plaintiff's remedy." *Id.*

7 Articles 17(2), 19, and 22(5) are silent as to emotional distress damages. But  
 8 courts have determined that purely emotional distress damages are not recoverable  
 9 under Articles 17(2) and 19. *See Daniel v. Virgin Atl. Airways, Ltd.*, 59 F.Supp.2d  
 10 986, 992 (N.D. Cal. 1998) (holding that purely emotional injuries are not available  
 11 under Article 19); *Rubin v. Air China Ltd.*, 2011 WL 2463271, at \*2 (N.D. Cal. Jun.  
 12 21, 2011) (finding that purely emotional injuries under Article 19 are not available  
 13 under the Montreal Convention); *Lee v. Am. Airlines, Inc.*, 355 F.3d 386, 387 (5th  
 14 Cir. 2004) (finding mental injury damages are not recoverable under Article 19 of  
 15 the Montreal Convention); *see also Vumbaca v. Terminal One Grp. Ass'n L.P.*, 859  
 16 F.Supp.2d 343, 367-68 (E.D. N.Y. 2012); *Fields v. BWIA Intern. Airways Ltd.*,  
 17 2000 WL 1091129, at \*6, n. 6 (E.D. N.Y. Jul. 7, 2000); *Bassam v. Am. Airlines*, 287  
 18 Fed. Appx. 309, 316, n. 8, 317-18 (5th Cir. 2008) (holding emotional distress  
 19 damages cannot be recovered under Articles 17(2) and 19).

20 Emotional distress damages are similarly not available under Article 22(5).  
 21 Although Article 22(5) lifts the limits with regard to damages, it does not invite  
 22 Plaintiff to seek damages precluded elsewhere by the Convention. In *Carey*, the  
 23 Ninth Circuit held that Article 25 of the Warsaw Convention, the predecessor to  
 24 Article 22(5), did not remove a plaintiff from the ambit of the Convention. *Carey*,  
 25 255 F.3d at 1049-51. In coming to this conclusion, the Court cited three sister  
 26 circuits, each of which "emphasized that, notwithstanding Article 25's removal of  
 27 limitations and exclusions on a carrier's liability, the rest of the Convention still  
 28 governs the action, including Article[] 17." *Id.* at 1050 (internal quotations omitted)

1 (citing *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1474, 1488–  
 2 89 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland on December 21,*  
 3 1988, 928 F.2d 1267, 1286 (2d Cir. 1991), overruled on other grounds by *Zicherman*  
 4 *v. Korean Air Lines Co.*, 516 U.S. 217 (1996); *Floyd v. Eastern Airlines, Inc.*, 872  
 5 F.2d 1462, 1483 (11th Cir. 1989), judgment reversed on other grounds by *Floyd*,  
 6 499 U.S. at 552). Thus, damages for emotional distress, including damages caused  
 7 by intentional conduct, are only recoverable pursuant to the limits set forth by  
 8 Article 17(1), which requires a physical injury. *See Carey*, 255 F.3d at 1048–49  
 9 (finding that an “accident” under Article 17 can include intentional misconduct).  
 10 Plaintiff has cited no cases to the contrary. Moreover, Article 22(5) “merely  
 11 precludes carriers from benefitting from the monetary ceilings on liability by  
 12 paragraphs 1 and 2 of Article 22 if they intentionally or recklessly cause damage.”  
 13 *Molefe v. KLM Royal Dutch Airlines*, 602 F.Supp.2d 485, 488 (S.D. N.Y. 2009).  
 14 The provision “does not independently create a cause of action for damages for any  
 15 alleged injury borne out of willful or reckless conduct.” *Id.*

16 Accordingly, the Court **GRANTS** Defendant’s motion to dismiss Plaintiff’s  
 17 cause of action for intentional infliction of emotional distress under Rule 12(b)(6)  
 18 for failure to state a claim upon which relief can be granted. Although it stretches  
 19 the Court’s imagination that the allegation of additional facts could possibly cure  
 20 the deficiency, the Court dismisses Plaintiff’s cause of action for intentional  
 21 infliction of emotional distress without prejudice.

### 22       **C.     Defendant’s Motion to Strike Pursuant to Rule 12(f)**

23       Defendant moves to strike Plaintiff’s prayer for punitive damages pursuant to  
 24 Rule 12(f) of the Federal Rules of Civil Procedure on the ground that the Montreal  
 25 Convention expressly prohibits the recovery of punitive and exemplary damages.  
 26 (ECF No. 4.) As discussed above, both of Plaintiff’s causes of action are  
 27 exclusively governed by the Montreal Convention. The Court acknowledges that  
 28 under the Montreal Convention Plaintiff cannot recover “punitive, exemplary or

1 other non-compensatory damages.” Montreal Convention, art. 29; *Carey*, 255 F.3d  
 2 at 1049-51; *Dazo*, 295 F.3d at 940; *Miller v. Cont'l Airlines*, 260 F.Supp.2d 931,  
 3 939-40 (N.D. Cal. 2003); *Jack v. Trans World Airlines, Inc.*, 854 F.Supp. 654, 663  
 4 (N.D. Cal. 1994) (citing *In Re Korean Airline Disaster of September 1, 1983*, 932  
 5 F.2d 1475 (D.C. Cir. 1991); *In Re Air Disaster at Lockerbie Scotland On December*  
 6 *21, 1988*, 928 F.2d 1267 (2d Cir. 1991)). However, “Rule 12(f) does not authorize  
 7 district courts to strike claims for damages on the ground that such claims are  
 8 precluded as a matter of law.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970,  
 9 974-76 (9th Cir. 2010). The Ninth Circuit has held that using Rule 12(f) in such a  
 10 way would allow litigants to “attempt to have certain portions of [an adverse  
 11 party’s] complaint dismissed or to obtain summary judgment against [the adverse  
 12 party] as to those portions of the suit,” and those actions are “better suited for a  
 13 Rule 12(b)(6) motion or a Rule 56 motion, not a Rule 12(f) motion.” *Id.* at 974.

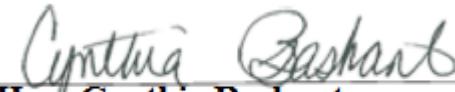
14 Accordingly, the Court **DENIES** Defendant’s motion to strike Plaintiff’s  
 15 prayer for punitive damages.

16 **V. CONCLUSION**

17 For the foregoing reasons, the Court (1) **DENIES** Plaintiff’s motion for  
 18 partial remand (ECF No. 9); (2) **GRANTS** Defendant’s motion to dismiss  
 19 Plaintiff’s cause of action for intentional infliction of emotional distress without  
 20 prejudice (ECF No. 5); and (3) **DENIES** Defendant’s motion to strike Plaintiff’s  
 21 prayer for punitive damages (ECF No. 4).

22 **IT IS SO ORDERED.**

23  
 24 **DATED: November 4, 2014**



25  
**Hon. Cynthia Bashant**  
 26  
**United States District Judge**

27  
 28